IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/01/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION NO. 13507 of 1998

K.Saroja ..Petitioner

-Vs-

1. Secretary to Government
of Tamil Nadu,
Public (Political Pension II)
Department, Secretariat,
Chennai-9

2. The Collector of Perambalur District
Perambalur ..Respondents

For petitioner:: Mr.M.V.Krishnan

For respondents: Mrs.D.Malarvizhi

Petition filed under Article 226 of The Constitution of India praying
for the issue of a writ of certiorari, as stated therein.

:O R D E R

The petitioner prays for the issue of a writ of mandamus directing the respondent to implement G.O.Ms.No.1243 Political Pension Department-II, dated 8.10.1997 and pay Rs.1500 per month as Freedom Fighter's Pension as dependent of Krishnasamy Padayachi, Ex-Indian Army person, who was granted pension.

2. Heard Mr.M.V.Krishnan, learned counsel appearing for the petitioner and Mr.D.Malarvizhi, learned Government Advocate appearing for the respondents.

3. The petitioner, widow of late Krishnasamy Padayachi has approched this court seeking for a direction that the entire pension of Rs.1 500/= per month has to be paid to her as the dependant of deceased Indian National Army pensioner. The petitioner's husband late Krishnasamy Padayachi was a soldier in the Indian National Army. The said Krishnasamy Padayachi during his life time receiving Freedom Fighters Pension as per the orders of the State Government. The pension sanction proceedings provides that pension will be

paid to the freedom fighter and after his life time to the widow till death or remarriage or till the petitioner's income exceeds a particular sum.

4. The petitioner asserts that she has not remarried and she is entitled to payment of pension. The pension has been revised from time to time and a monthly pension of Rs.1500/= was being paid. The pension has also been subsequently revised at the time of death of the said Krishnasamy Padayachi. He had left his two widows and therefore the respondent was paying them one one half each. The other widow passed away and therefore the petitioner represented that she should be paid the full pension of Rs.1500/= per month. Despite several representations the respondents have not chosen to take any action. Hence the present writ petition to direct the respondents to pay the full pension as the sole surviving widow of the deceased pensioner Krishnasamy Padayachi.

5. On behalf of the respondents, the first respondent filed a counter. According to the respondents, late Krishnasamy Padayachi of Andimadam Village by virtue of membership with Indian Army was granted State Freedom Fighters Pension with effect from 21.7.1967 as per Freedom Fighters Pension Order No.3214/69, dated 1.2.1969. The said Krishnasamy Padayachi passed away on 24.8.1973 leaving two wives at the time of his death. The writ petitioner is the second wife and she applied for family pension without disclosing the existence of the first wife Rajammal of the deceased pensioner. Based upon the said representation, after enquiry the Government sanctioned one half of payment of Freedom Fighters Pension to the writ petitioner and the other half of the pension to the said Rajammal. Such order was passed after thorough investigation as per the report of the District Collector.

6. The Family Pension has been fixed and the petitioner was paid 50% of the Family Pension, namely Rs.750/= and the other widow Rajammal was paid the other half The said Rajammal, the first wife of the deceased-freedom fighter -pensioner expired on 9.11.1992. The petitioner applied for full pension including the 50% share that was being paid to Rajammal. The State Government by letter dated 22.10.1996 turned down the request as there is no provision in the Tamil Nadu Freedom Fighters Pension Rules annexed to G.O.Ms.No.2064, Public dated 28.3.1966 as amended by subsequent G.O.No.699, dated 18.3.1980 for sanction of full pension to the surviving wife on the demise of the freedom fighter's first wife. As per rule 7 of the Rules a share of pension payable to the first wife is payable till her death or remarriage. The petitioner is entitled to only one half and she cannot claim the other half even after the death of Rajammal. The petitioner is not entitled to the relief of mandamus prayed for as she has no legal right and the respondents pray for the dismissal of the writ petition.

7. The points that arise for consideration are:
(A) Whether on the death of one of the two widows the surviving widow will be entitled for payment of full family pension that was paid for both the widows as dependent of the deceased pensioner?
(B) Whether the petitioner is entitled to the relief of mandamus prayed for?

8. There is no dispute that the petitioner Krishnaswamy Padayachi who was receiving pension as an Ex-Indian National Army personnel, passed away leaving his two widows. Therefore the State Government, the first respondent passed orders directing payment of pension payable to the family of the deceased in two equal moieties to the two widows. Both the widows were receiving one half of the pension which was being paid to their deceased husband till his life time and they continue to share the same equally. One of the two widows died and the petitioner, surviving widow claimed that the entire family pension should be paid to her and there is no justification to deny the other half which was being paid to deceased co widow.

9. It is contended by the respondents that the petitioner being one of the surviving widows is entitled to one half by way of family pension and therefore she is not entitled to the relief prayed for in this writ petition. Concedingly there is no rule or regulation that has been framed in this respect by the State Government, nor there is any scheme regulating the succession among the co widows. In the absence of any Government Orders or Notification or Rules or Scheme we have to examine what is the right of the widows on the death of their husband who was a recipient of Freedom Fighters Pension during his life time or the right of surviving widow. In the counter except stating that the petitioner is not entitled to entire person and the petitioner cannot claim the other half which was being paid to the deceased Rajammal, co widow, no rule or order or statutory provision is being relied upon by the respondents in this respect.

10. Pension in this case is admissible under the Scheme framed by the State Government to the Freedom Fighter and Krishnasamy Padayachi and on his death to his family members. Family Members are being paid and continued to be paid with the family pension on the untimely death of the deceased husband which results in the dependent namely the widow being a destitute and she is granted special family pension. Such family pension is admissible on account of the the status of the widow or plurality of the widows, if they are legally married.

11. On the death of the husband such pension by no stretch of imagination could ever form part of the estate of the deceased and consequently it could never be the subject matter of testamentary disposition. This legal position has been laid down by the Apex Court in Jodh Singh Vs. Union of India, reported in 1980 (4) SCC 306.

12. Taking the case of succession by co widows inheriting husband' s property, it is the settled legal position that they become joint tenants with rights of survivorship. In Karpagathachi and others Vs. Nagarathinathchi, reported in AIR 1965 SC 1752, the Apex Court held thus:-

"3. We are of opinion that the first contention of Mr.Viswanatha Sastry should be rejected. Under the Hindu law as it stood in 1924, two widows inheriting their husband's properties took together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment. They were entitled to enforce a partition of those properties so that each could separately possess and enjoy the portion allotted to her, see Bhugwan Deen

Doobey Vs. Myna Baee, 11 Moo Ind.App.487 (PC), Gauri Nath Kakaji V. Mt.Gaya Kuar, 55 Ind App 399: (AIR 1928 PC 251) Neither could without the consent of the other enforce an absolute partition of the estate so as to destroy the right of survivorship, see Commissioner of Income-tax V. Smt.Indiara Balakrishna 1960-3 SCR 513 at p.515. But by mutual consent they could enter into any arrangement regarding their respective rights in the properties during the continuance of the widows estate, and could absolutely divide the properties so as to preclude the right of survivorship of each to the portion allotted to the other. See Ramakkal Vs. Ramasami naickan, ILR 22 Mad 522, Sudalai Ammal V. Gomathi Ammal 28 Mad LJ 355. Likewise, two daughters succeeding to their fathers estate as joint tenants with right of survivorship could enter into a similar arrangement. See Kailash Chandra Chuckerbutty Vs. Kashi Chandra ILR 24 Cal 339, Subbammal Vs. Krishna Aiyar 26 Mad LJ 479, Ammani Ammal V. Periasami Udayan 45 Mad LJ 1. Such an arrangement was not repugnant to S.6(a) of the Transfer of Property Act, 1882. the interest of each widow in the properties inherited by her was property, and this property together with the incidental right of survivorship could be lawfully transferred. Section 6(a) of the Transfer of Property Act prohibits the transfer of the bare chance of the surviving widow taking the entire estate of the next heir of her husband on the death of the co widow, but it does not prohibit the transfer by the widow of her present interest in the properties inherited by her together with the incidental right of survivorship. The widows were competent to partition the properties and allot separate portions to each and incidental to such an allotment, each could agree to relinquish her right of survivorship in the portion allotted to the other. The fist contention of Mr. Viswanatha Sastry must be rejected."

13. The above pronouncement will govern the case where husband has left an estate, which is to be inherited by the co-widows. But, in this case family pension being paid is not part of the estate left by the deceased husband, but it is part of the claim under which the widow is entitled to such a payment on the death of her husband, so that she could lead a normal life.

14. In Anar Kumari Vs. Jamuna Prasad Singh, reported in 1976 (4) SCC 826, the Apex Court while following the pronouncement in Karpagathathi Vs. Nagarathinatchi, (AIR 1965 SC 1752) held that the widows take a character of joint tenants and none of them has a right to enforce the absolute partition of the estate against them so as to destroy the right of survivorship.

15. The status of co-widows or Co-heiresses and their right of succession as joint tenants was the subject matter of consideration in Brahmvart Sanathan Dharam Mahamandal, Kanpur and others Vs. Prem Kumar and others, reported in 1985 (3) SCC 350. While approving the passage in Hindu Law by N.R.Raghavachari, the legal position has been summarised as hereunder: "Where two widows succeed as co-heiresses to their husband's estate, one of them cannot alienate the property without the consent of the other even though the alienation for the necessity of the estate. They are entitled to obtain a partition of separate portions of the property and deal as each pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor of a future reversioner. If they act together, they can burden the reversion with

any debts contracted owing to legal necessity, but one of them acting without the authority express or implied of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime and a mortgage by a Hindu widow even for necessary purposes, when she has not even asked her co widow to consent to the granting of the mortgage, is not binding upon the joint estate so as to affect the interest of the surviving widow, and the mere fact that there has been enmity between the cowidows is not justification for the failure to take the consent of the cowidow.

16. In Poonamal Vs. Union of India, reported in 1985 (3) SCC 345, in respect of family pension payable under the Contributory Family Pension Scheme of 1985, the Apex Court held that pension is not merely a statutory right, but it is the fulfillment of constitutional promise as it partakes the character of public assistance in case of unemployment, old age, disablement or similar other cases of undeserved want. In that respect, the Apex Court held thus:-

"7. It is not necessary to examine the concept of pension. As already held by this court in numerous judgments pension is a right, not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion o the Government but is governed by the relevant rul;es and anyone entitled to the pension under the rules can claim it as a matter of right. (Deoki Nandan Prasad Vs. State of Bihar (197 1 (2) SCC 330) and D.S.Nakara Vs. Union of India (1983 (1) SCC 305). Where the Government Servant rendered service to compensate which a family pension scheme is devised, the widow and the dependent minors would equally be entitled to family pension as a matter o right. In fact we look upon pension not merely as a statutory right but as a fulfillment of a constitutional promise inasmuch as it partakes the character of public assistance in cases of unemployment, old-age, disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate. That is how pension has been looked upon in D.S.Nakara judgment. At the hearing of this group of matters wee pointed out that since the family pension scheme has become non-contributory effective from September, 22, 1977 any attempt at denying its benefit to widows and dependents of Government servants who had not taken advantage of the 1964 liberalisation scheme by making or agreeing to make necessary contribution would be denial of equality to persons similarly situated and hence violative of Article 14. If widows and dependents of deceased Government servants since after September 22, 1977 would be entitled to benefits of family pension scheme without the obligation of making contribution, those widows who were denied the benefits on the ground that the Government servants having not agreed to make the contribution, could not be differently tread because that would be introducing an invidious classification among those who would be entitled to similar treatment. When this glaring dissimilar treatment emerged in the course of hearing in the court, Mr.B.Dutta learned counsel appearing for the union of India requested for a short adjournment to take further instructions."

17. In Violet Issaac Vs. Union of India reported in 1991 (1) SCC 725

, the scope of claim with respect to family pension on the basis of a Will was the issue. While negativing the claim of persons who claimed testamentary succession, the Apex Court held thus:-

"The Family Pension Scheme under the Rules is designed to provide relief to the widow and children by way of compensation for the untimely death of the deceased employee. The Rules do not provide for any nomination with regard to family pension, instead the Rules designate the persons who are entitled to receive the family pension. Thus, no other person except those designated under the Rules are entitled to receive family pension. The employee has no title nor any control over the family pension as he is not required to make any contribution to it. The family pension scheme is in the nature of a welfare scheme. Therefore, it does not form part of his estate enabling him to dispose of the same by testamentary disposition. Accordingly, in the present case the widow of the deceased Railway employee is entitled to receive the family pension, notwithstanding the will alleged to have been executed by the deceased."

18. In the present case the deceased has not left any other heirs except his two widows and therefore the two widows were being paid equally. Even according to the scheme if there is only one widow then the entire family pension should be paid to the said sole widow. If there are more than one widow, then the payment of the family pension is being made in equal moieties to the two widows.

19. Had there not been two widows, the petitioner will be entitled to the entirety of the pension. As there were two widows on the death of the deceased-pensioner, it was paid in equal moieties. Therefore the family pension on the death of one of the co widows, the other co widow will get in its entirety as if she is the sole widow.

20. In the light of the above pronouncements of the Supreme Court and the nature of right that has been conferred under the Pension Rules, this court holds that the writ petitioner is entitled for payment of the entirety of the family pension, which was being paid to both the widows in equal moieties and the respondent is directed to pay all the arrears since the death of the co widow Rajammal and continue to pay the full family pension to the petitioner directly during her life time. Both the points are answered in favour of the petitioner and against the respondents.
21. The respondents are granted time to pay arrears of pension by three months from the date of communication of a copy of this order or production of a copy by the petitioner. The writ petition is allowed. The parties shall bear their respective costs.
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